

T. BROWN CONSTRUCTORS, INC.

IBLA 85-830

Decided January 6, 1987

Appeal from a decision of the Area Manager, Farmington Resource Area, New Mexico, Bureau of Land Management, denying request for reinstatement of mineral material sales contract MS 30-010-(F)77-1.

Set aside and remanded.

1. Bureau of Land Management -- Materials Act -- Regulations:  
Generally -- Rules of Practice: Appeals: Generally

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically terminated and remand the case to BLM to allow the exercise of its discretion.

APPEARANCES: Ted F. Brown, President, T. Brown Constructors, Inc., Albuquerque, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

T. Brown Constructors, Inc., has appealed from a decision of the Area Manager, Farmington Resource Area, New Mexico, Bureau of Land Management (BLM), dated July 24, 1985, denying its request for reinstatement of a mineral material sales contract, MS 30-010-(F)77-1.

Appellant was the successful bidder for a mineral material sales contract, authorizing the removal of sand and gravel for the duration of production from 55 acres of land situated in portions of lots 1 through 3, sec. 8, T. 28 N., R. 11 W., and the SE 1/4 SE 1/4 sec. 31, T. 29 N., R. 11 W., New Mexico Principal Meridian, San Juan County, New Mexico, at a February 16, 1977, competitive sale. By letter dated March 22, 1977, BLM required appellant to, within 30 days of receipt of the letter, sign and return copies of the sales contract, an "initial installment" of \$ 1,000, payment of the advertising costs of the sale, and a performance bond in the amount of \$ 20,000. On April 21, 1977, appellant submitted the signed contract, together with the appropriate payment and performance bond.

On May 13, 1977, the State Director, New Mexico, BLM, signed the mineral material sales contract. Section 2 of the contract required annually either minimum production "at least equal to an amount sufficient to return to the Government a sum of money equal to the first installment of the contract paid by the Purchaser," or "payment in the amount of the first installment \* \* \* in lieu of such minimum production." Section 2 further provided: "Such payment in lieu of minimum production shall be payable on or before the anniversary of the effective date." Section 4(a) of the contract stated the "first installment" was \$ 1,000.

Each year between 1978 and 1984, appellant submitted a payment "in lieu of minimum production," as no mineral material was removed under appellant's sales contract. On June 3, 1985, BLM received a check for payment in lieu of minimum production for the period April 1, 1984 to May 1, 1985 in an envelope postmarked May 30, 1985. By letter dated June 7, 1985, the Area Manager informed appellant that appellant's sales contract was "hereby terminated" because payment was not made on or before the anniversary of the effective date of the contract, i.e., "May 13th, the date it was signed," in accordance with section 2 of the contract.

In a letter dated June 27, 1985, appellant contended termination of its sales contract was "unfair" and requested reinstatement of the contract. In his July 1985 decision, the Area Manager concluded that appellant's sales contract had "automatically terminated by its own terms" and BLM had no authority "to continue this contract [or] to issue another Duration of Production Contract." The Area Manager stated that the sand and gravel would be offered for competitive sale or, in the absence of any competitive interest, for non-competitive sale. Appellant has appealed from the July 1985 BLM decision.

In its statement of reasons for appeal, appellant argues its mineral material sales contract should be reinstated because it received no notice of payment due from BLM, payment was merely "delayed," 1/ appellant's intentions to renew were well known by BLM" and BLM had previously allowed a "grace period" for payment. 2/ Appellant contends it has a \$ 55,000 investment in the sales contract and, although it has not removed any sand and gravel from the land, the mineral deposit provides a reliable basis for making bids: "Having a known source saves us exploration costs and pit locating time." Appellant states it has "bid 20 projects \* \* \* with this pit as the gravel source."

---

1/ Appellant points out that its 1985 check is dated May 9, 1985, but "its delivery to BLM was somehow delayed."

2/ Appellant notes the annual payments made in 1978 and 1979 were received by BLM, respectively, on July 12, 1978 and May 14, 1979, after the contract's anniversary date. Appellant is partially mistaken here. The 1979 payment was actually received timely on May 9, 1979. And, while the 1978 payment was late it was received on July 11, 1978. Appellant has apparently confused the date of the receipt for payment with the date that the payment was received.

[1] Appellant's mineral material sales contract was issued pursuant to section 1 of the Materials Act of 1947, as amended, 30 U.S.C. § 601 (1982), which provides that the Secretary of the Interior, "under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, \* \* \* gravel \* \* \*) on public lands of the United States." The Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1982), does not define the terms and conditions of mineral material sales contracts, such as minimum production, payment in lieu of production, or the consequences of noncompliance with terms and conditions. See Don Kelland Materials, Inc., 35 IBLA 133 (1978). These provisions are governed by Departmental regulation.

At the time appellant's sales contract was entered into, the applicable regulation, 43 CFR 3610.4(d)(3) (1976), required annual, minimum production or payment in lieu of production. In addition, the regulation provided:

Payments for or in lieu of minimum annual production shall be due and payable and must be received by the authorized officer on or before the anniversary date of the execution of the contract, failing which the contract shall be considered breached and terminated, and all money paid pursuant to the contract shall be forfeited.

43 CFR 3610.4(d)(3) (1976). This regulation was incorporated in appellant's sales contract at section 5, which provides in relevant part: "The rights of the Purchaser shall be subject to the regulations in 43 CFR \* \* \* Group 3600, (which are made a part of this contract)." Departmental regulation 43 CFR 3610.4(d)(3) (1976) was explicitly incorporated in appellant's sales contract at section 2:

This contract shall be terminated immediately for failure to maintain the minimum production schedule established in the mining plan, except that one annual payment in the amount of the first installment may be made in lieu of such minimum production. Such payment in lieu of minimum production shall be payable on or before the anniversary of the effective date.

Thus, both 43 CFR 3610.4(d)(3) (1976) and section 2 of appellant's sales contract provide for automatic termination of the contract upon the failure to make the required payment on or before the anniversary date of execution of the contract. 3/ Normally, appellant would be bound by the applicable.

---

3/ We note section 23 of the contract provides that, generally in the case of the purchaser's failure to comply with the terms and conditions of the contract, the authorized officer is required to serve notice of such non-compliance on the purchaser requiring corrective action and, following a failure to take such action, the authorized officer "may take whatever action is necessary to protect the Government's interest, including cancellation of the contract."

contractual provisions, especially when mandated by Departmental regulation. See Santa Fe Sand and Gravel Co., A-30657 (Apr. 25, 1967), aff'd, Santa Fe Sand and Gravel Co. v. Rasmussen, Civ. No. 7135 (D. N.M. May 28, 1968).

However, effective July 11, 1983, the Department amended the applicable regulation (recodified as 43 CFR 3610.1-3(a)). See 48 FR 27013 (June 10, 1983). Departmental regulation 43 CFR 3610.1-3(a)(5) still requires payment for or in lieu of minimum annual production which is due "on or before the anniversary date of the execution of the contract." However, 43 CFR 3610.1-3(a)(6) provides that "[f]ailure to comply with the terms and conditions for payment shall constitute a breach of contract and the authorized officer may terminate the contract." (Emphasis added.) It is clear that, under the current regulation, BLM now has discretionary authority to terminate a sales contract for a late payment "in lieu of minimum production." The regulation no longer provides for automatic termination.

It is well established that, in the absence of intervening third party rights which would be adversely affected or countervailing public policy, the Department may apply an amended regulation to a pending matter if doing so benefits the affected party. Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (1986); Hugh L. Scott, 83 IBLA 184 (1984); James E. Strong, 45 IBLA 386 (1980). We conclude that application of the amended regulation, i.e., 43 CFR 3610.1-3(a)(6), is warranted herein, and will, therefore, set aside the July 1985 BLM decision and remand the case to BLM for the exercise of its discretion, under that regulation, on whether to terminate appellant's sales contract because of the late payment. <sup>4/</sup> The Area Manager stated he regarded late payment as resulting in the automatic termination of the sales contract: "When the anniversary date of the contract passed without receipt of the payment the contract was automatically terminated by its own terms," and did not regard the exercise of discretion as an option. By applying the amended regulation we will afford the Area Manager that option. Cf. Sierra Club, Oregon Chapter, 87 IBLA 1 (1985); Don Kelland Materials, Inc., supra.

We can discern no reason not to apply the amended regulation. Cf. Hugh L. Scott, supra. Third party rights are not adversely affected and we find no countervailing public policy considerations. BLM may still determine it appropriate to terminate the contract and proceed to offer the sand and gravel for noncompetitive or competitive sale. We merely offer BLM the opportunity to weigh the relative advantages and disadvantages when deciding whether to terminate the contract.

---

<sup>4/</sup> In applying the amended regulation, we do not otherwise affect the terms and conditions of appellant's sales contract. We also do not deem it necessary to invoke section 23 of the contract (see note 3), which was not designed to apply in the case of late production payments or payments in lieu of minimum annual production.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

R. W. Mullen  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

